Public Bank Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khiing

HIGH COURT (KUCHING) — SUIT NO 22–14 OF 2003-II
LAU BEE LAN J
11 JUNE 2005

Civil Procedure — Summary judgment — Triable issues — Whether notice given to defendant adequate — Whether there was variation of account numbers — Variation of signatures — Whether there was a lack of proper statement of accounts

Civil Procedure — Service — Notice of demand — Notice of variation of interest rate — Notice sent to last known address — Whether adequate notice given to defendant — Deemed service

The plaintiff granted an overdraft facility to the defendant. The plaintiff alleged that the defendant was in breach of the said overdraft facility and issued notices of demands to the defendant at the defendant's last known address demanding the outstanding amount and interest accrued thereon. However, the defendant failed to respond to the said notices. The plaintiff commenced legal proceedings and subsequently, the application for summary judgment. In response to the plaintiff's application, the defendant had raised the following issues: (i) no notice of variation of the interest rates was received by him personally as the said notice was received by 'MK Corporation'; (ii) the plaintiff demanded sums from a different account number; (iii) there was a variation of signatures existed in the letters of demand; and (iv) there was no proper statement of accounts.

Held, allowing the plaintiff's application:

(1) Pursuant to cl 48, the plaintiff was not obliged to issue a notice to the defendant on any increase in the interest rate. Thus, there was no requirement for service of exh H (notice of variation of interest rate) (see paras 12–13).

(2) In any event, the plaintiff had complied with the requirements of cl 3 as the notice notifying of the change in interest rate was sent by hand to the defendant at 'his last address registered' with the plaintiff, ie the notified address, therefore such service of the notice shall be deemed to have been sufficiently served on the defendant (see para 18).

(3) The acknowledgment made bearing the chop/seal of 'MK Corporation' was immaterial as the notice was addressed specifically to the defendant at the notified address. On the facts, the plaintiff had effected proper service in the manner contractually envisaged between the parties. Therefore, there was no merit in the defendant's contention that there was a triable issue in that he did not receive notice of the increase of the interest (see paras 20, 24–25).

(4) On the facts, it was obvious that there were no merits in the defendant's contention of there being a triable issue with regard to there being different account numbers as the defendant himself quoted the account number when he wrote to the plaintiff (exh I) (see paras 27–29).

(5) Although the signature in exh G and the signature of the defendant in exhs A, B and C was different, this did not detract from the fact that since exh I was written by the defendant himself (which was not denied) requesting all correspondences to be forwarded to him at the notified address and to which exh H was addressed to and thereafter served by hand, the court could only conclude there had been proper service for the reasons abovementioned. Therefore, the contention of variance of signature in exh G and exhs A, B and C was of no consequence at all (see para 32).

(6) On the facts, the instant case could be distinguished from the case of UOL Credit Sdn Bhd as the plaintiff had produced sufficient particulars as to the statement of account to disclose the amount due and owing by the defendant and besides, the defendant himself admitted receiving from the plaintiff a statement of account as evident by exh I and this issue of no proper statement of account was never raised until the plaintiff instituted this action against the defendant. Therefore, the defendant's contention that there was no proper statement of account was baseless (see para 39).

[Bahasa Malaysia summary

Plaintif memberikan kemudahan overdraf kepada defendan. Plaintif mengatakan yang defendan telah mengingkari kemudahan overdraf tersebut dan mengeluarkan beberapa notis tuntutan kepada defendan yang dialamatkan kepada alamat terakhir defendan yang diketahui menuntut jumlah tertunggak dan faedah yang terakru ke atasnya. Namun begitu, defendan gagal mematuhi notis tersebut, lalu plaintif pun memulakan prosiding undang-undang dan kemudiannya, membuat permohonan untuk penghakiman terus. Membalas kepada permohonan plaintif, defendan membangkitkan isu-isu di bawah: (i) tiada notis perubahan kadar faedah diterima oleh defendan secara kediri kerana notis tersebut diterima oleh 'MK Corporation'; (ii) plaintif menuntut jumlah dari nombor akaun yang berbeza; (iii) terdapat satu perbezaan tandatangan yang wujud dalam surat-surat tuntutan; dan (iv) tiada pernyataan akaun yang teratur.

Diputuskan, membenarkan permohonan plaintif:

(1) Menurut kl 48, plaintif tidak wajib untuk mengeluarkan satu notis kepada defendan mengenai sebarang pertambahan kadar faedah. Oleh yang demikian, tiada keperluan untuk penyerahan eksh H (notis pertukaran kadar faedah) (lihat perenggan 12–13).

(2) Dalam apa-apa keadaanpun, plaintif telah mematuhi keperluan kl 3 kerana notis yang memberitahu perubahan kadar faedah telah dihantar secara serahan tangan kepada defendan di 'alamat terakhirnya yang didaftarkan' dengan plaintif iaitu alamat notis, dari itu serahan notis tersebut akan dianggap memadai terhadap defendan (lihat perenggan 18).

(3) Akuan yang dibuat oleh cop/meterai 'MK Corporation' adalah tidak material kerana notis tersebut dialamatkan khusus kepada defendan pada alamat notis. Pada fakta, plaintif telah membuat serahan yang teratur secara kontrak

sebagaimana yang diperuntukkan oleh kedua-dua pihak. Dari itu, tiada merit dalam dakwaan defendan yang terdapat isu yang boleh dibicarakan kerana beliau tidak menerima notis kenaikan kadar faedah (lihat perenggan 20, 24–25).

(4) Pada fakta ianya jelas bahawa tiada merit dalam dakwaan defendan yang terdapat isu yang boleh dibicarakan berhubung dengan perbezaan nombor akaun kerana defendan sendiri telah menyebut nombor akaun tersebut dalam suratnya kepada plaintif (eksh I) (lihat perenggan 27–29).

(5) Walaupun tandatangan dalam eksh G dan tandatangan defendan dalam eksh A, B dan C adalah berbeza, ianya tidak lari dari fakta yang oleh kerana eksh I ditulis oleh defendan sendiri (yang mana tidak dinafikan) memohon kesemua surat-menyurat dimajukan kepadanya pada alamat notis dan yang mana eksh H telah dialamatkan dan yang kemudiannya diserahkan dengan tangan, mahkamah dengan itu memutuskan yang terdapat serahan yang teratur atas sebab-sebab yang telah dinyatakan di atas. Dari itu, dakwaan yang terdapat perbezaan tandatangan tidak membawakan apa-apa kesan (lihat perenggan 32).

(6) Pada fakta-fakta, kes semasa boleh dibezakan dengan kes UOL Credit Sdn Bhd kerana plaintif telah mengemukakan butiran yang mencukupi berhubung dengan pernyataan akaun bagi menyatakan jumlah yang kenabayar oleh defendan dan sebaliknya, defendan sendiri mengakui menerima satu pernyataan akaun dari plaintif sebagaimana yang ditunjukkan oleh exh I dan isu ketiadaan pernyataan akaun yang teratur ini tidak pernah ditimbulkan oleh defenden sehinggalah plaintif memulakan tindakan ini terhadap defendan. Maka, dakwaan defendan yang bahawa tiada terdapat pernyataan akaun yang teratur, tidak berasas (lihat perenggan 39).]

Notes

For cases on service of notice of demand, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2154–2155.

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3170–3243.

Cases referred to

Arab-Malaysian Finance Bhd v Chong Chin Shoong [1997] MLJU 264 (folld)

Bank fur Gemeinwirtschaft v City of London Garages Ltd & Ors [1971] 1 All ER 541 (refd)

Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd [1990] 3 MLJ 1 (refd)

Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168 (refd)

Hong Leong Finance Bhd v Travers Development Sdn Bhd [2001] 5 MLJ 268 (folld)

Koh Siak Poo v Perkayuan OKS Sdn Bhd [1989] 3 MLJ 164 (refd)

Miles v Bull [1968] 3 All ER 632 (refd)

Sogelease Advance (M) Sdn Bhd v Sri Datai Engineering Sdn Bhd & Ors [2002] 6 MLJ 59 (refd)

UOL Credit Sdn Bhd v Zainuddin bin Abdul Rahman & Anor [2000] MLJU 486 (distd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657 (refd)

Legislation referred to
Rules of the High Court 1980 O 14 r 3
National Land Code 1965 s 256

Lau Mei Ling (Sim & Yee Advocates) for the plaintiff.
John Jussem (Battenberg & Talma Advocates) for the defendant.

Lau Bee Lan J:

[1] This is an appeal by the appellant, Tan Sri Dato' Paduka (Dr) Ting Pek Khiing, (defendant in the court below) against my decision made on 15 October 2004 wherein I had reversed the order of the learned deputy registrar given on 19 January 2004 and allowed order in terms of the respondent's (plaintiff in the court below) application dated 15 July 2003.

[2] The plaintiff's application is essentially for summary judgment against the defendant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC') in respect of the following claim:

(a) the sum of RM26,229,013.35 as at 8 January 2003;

(b) interest at the rate of 3.50% above the plaintiff's current base lending rate of 6.40%pa on monthly rests on the sum of RM26,229,013.35 being the overdraft facility from 9 January 2003 until date of full and final settlement; and

(c) costs on solicitors and client basis in the sum of RM287,790.13 or alternatively, costs to be taxed unless agreed upon.

[3] Briefly, the undisputed facts are as follows. The plaintiff granted a credit overdraft to the extent of RM13,500,000 ('the said overdraft facility') to the defendant vide a letter of offer dated 23 April 1998, exh A. The said overdraft facility was fully secured by a memorandum of charge dated 10 January 1998 registered at the Kuching Land Registry Office on 10 January 1998 as Instrument No L368/1998 ('the said charge') whereby the defendant charged to the plaintiff all the defendant's undivided right title share and interest in the following two parcels of land, ie (i) Lot 47 Section 46 Kuching Town Land District; and (ii) Lot 747 Block 246 Salak Land District (see exh B).

[4] The plaintiff continued to grant the said overdraft facility vide a second letter of offer dated 9 March 2001 (exh C). The said overdraft facility under the second letter of offer was secured by a memorandum of deposit by way of security of certificates of stocks, shares etc as per exh D.

[5] The plaintiff alleged that the defendant was in breach of the said charge and the second letter of offer by failing to keep the said overdraft facility within its operating limit and as at 9 December 2002, the defendant was indebted to the plaintiff in the

sum of RM26,968,535.60 being the total outstanding amount and interest accrued thereon at the rate of 3.50%pa above the plaintiff's current BLR at 6.40%pa chargeable from 10 December 2002 until the date of full and final payment. The plaintiff further alleged that it issued and served on the defendant the two notices of demand, one dated 1 October 2002 demanding the sum of RM13,977,731.01 (being the excess overdraft facility together with interest as at 26 September 2002) as per exh E and the other notice of demand dated 9 December 2002 demanding RM26,968,535.60 (payment of the total outstanding amount due as at 9 December 2002 together with accrued interest and cost) as per exh F. According to the plaintiff, the defendant failed to respond to the said dotices of nemands which led the plaintiff to institute this action claiming for RM26,229,013.35 together with the prescribed interest rate and costs based on the statement of account between the plaintiff and defendant as at 8 January 2003 (see para 17 of the statement of claim) and subsequently, this application by the plaintiff for summary judgment.

[6] It is trite law that an appeal of this nature is to be approached as a rehearing by the appellate court (see *Koh Siak Poo v Perkayuan OKS Sdn Bhd* [1989] 3 MLJ 164). At p 165 of the aforesaid Supreme Court case, Hashim Yeop A Sani CJ opined:

> The approach to be taken by an appellate court in an O 14 appeal has been settled. The appeal court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing. This principle was reiterated in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 which referred to *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 following European Asian Bank v Punjab and Sind Bank [1983] 2 All ER 508; [1983] 1 WLR 642 at p 516

[7] As far as the law to be applied in the determination of the plaintiff's application there appears to be no dispute. The defendant contended that he has raised the following triable issues:

(i) the defendant never received notice of the increased rate of 3.5%pa above the BLR at 6.4% in respect of the first letter of offer; n

(ii) the plaintiff demanded sums from a different account number;

(iii) variation of signatures existed in the letters of demand dated 1 October 2002 (exh E) and 9 December 2002 (exh F); and

(iv) no proper statement of accounts; hence amounts of RM13,977,731.81 in exh E and RM26,968,535.60 in exh F are disputed.

(I) No Notice of Variation of Interest Rate

[8] In respect of this purported triable issue (i), the defendant relied on cl 3 of the letter of offer dated 23 April 1998 (exh A) and cl 3 of the said charge (exh B) 25 submitting that these clauses provide that any variation of rates has to be served on the chargor personally by, inter alia, notice in writing. The defendant submitted that he did not receive the notice of variation personally because the notice of variation was received by 'MK Corporation', a corporate body as borne by the chop/seal exhibited in exh G. Here, Mr John Jussem, learned counsel for the defendant, seems to capitalise on the point that the effect of cl 3 of exh A and exh B respectively is that notice of variation of interest rates has to be served on the 'chargor' personally, ie the

defendant who must personally receive it and not as in this case, a corporate body bearing the chop/seal of 'MK Corporation'.

[9] The plaintiff however contended that it has served the notice for increase of interest rate dated 11 October 2002, exh H, on the defendant at the defendant's address at Level 9, Wisma Ting Pek Khiing, No 1, Jalan Padungan, 93100 Kuching as requested by the defendant as per exh I that all correspondences including bank statement in respect of current account number 184-3114709405 are to be forwarded to the aforesaid address. The plaintiff further submitted that the two letters of demand (exhs E and F) were served on the defendant based on the same address and the defendant did not deny receiving them. Learned counsel for the plaintiff, Ms Lau Mei Ling, cited the cases of *Koh Siak Poo v Med-Bumikar Mara Sdn Bhd* [1994] 3 MLJ 610, *Arab-Malaysian Finance Bhd v Chong Chin Shoong* [1997] MLJU 264 and *Hong Leong Finance Bhd v Travers Development Sdn Bhd* [2001] 5 MLJ 268 arguing that the onus was on the defendant to notify the plaintiff of any change of address or that he was no longer occupying the said address, and since there is none, the court should hold that there was proper service of exh H.

[10] In further response to the defendant's allegation of non receipt of the notice of increased interest rate vide the first letter of offer (exh A) the plaintiff referred to cl 48 of the said charge (exh B) which stipulates: If the chargor shall draw in excess of the approved limit, the chargee shall be entitled without notice to the chargor to charge the account of the chargor additional interest at such rate determined by the chargee at its full discretion on all drawings in excess of the approved limit and such additional interest shall be secured and payable under this charge.

[11] Relying on the said cl 48, the plaintiff submitted that no notice of increase in interest rate has to be given to the defendant. The plaintiff further submitted that it had gone beyond its obligation by issuing the Notice of increase of interest rate charged dated 11 October 2002 (exh H) to the defendant at the aforesaid address. Even in respect of exh H, Miss Lau Mei Ling submitted that if the court is not with the plaintiff as to no requirement for service of exh H, the plaintiff relied on the principle alluded to in the cases of Koh Siak Poo, Chong Chin Shoong and Travers Development Sdn Bhd.

[12] With regard to the purported triable issue (i), in respect of the plaintiff's invocation of cl 48 of the said charge (exh B), I agree with Ms Lau Mei Ling that based on the said clause, the plaintiff bank is not obliged to issue a notice to the defendant on any increase in interest rate because the wordings of cl 48 are explicit in its terms as quoted above. There is evidence adduced by the plaintiff that the said overdraft facility of the defendant was in excess of the operative limit of RM12,700,000 and the excess overdraft was in the tune of RM13,977,731.01 as depicted in exh E. Therefore, I agree as submitted by Ms Lau Mei Ling, there is no requirement for service of exh H.

[13] In the event my finding on this matter is wrong, I now turn to the issue of whether there is proper service of exh H. I am of the view that the plaintiff has not breached the requirements of cl 3 of the first letter of offer (exh A) and cl 3 of the said charge (exh B) as contended by the defendant.

[14] Clause 3 of the letter of offer (exh A) states, inter alia:

Our current Base Lending Rate (BLR) is 2.20 %.a. The rate of interest and/or BLR shall be subject to review and may be altered at any time and from time to time at our discretion by serving a notice of variation in writing on you and such amended rate shall be effective from the date specified in the said notice. Such notice may be in the form of unsigned printed or computer generated format and shall be deemed to have been sufficiently served on you *if it is left* at or sent by post to your *last address registered* with us. (Emphasis added.)

[15] Clause 3 of the said charge (exh B) states, inter alia:

Notwithstanding the provisions relating to the rate of interest as hereinbefore provided, the chargee shall be entitled at any time and from time to time to vary at its discretion the prescribed rate and/or such rate or rate(s) of interest by serving a notice in writing on the chargor(s) or at the chargee's absolute discretion by general advertisement in any one or more of the form(s) of mass communication/mass media or newspaper or in any other manner as the chargee deems fit and such amended rate or rates of interest shall be payable as from the date specified in the said notice or general advertisement as the case may be. Such notice if in writing shall be deemed to have been sufficiently served on the chargor(s) if it is left at the usual or last known place of residence or business of the chargor(s) or at the address abovestated of the chargor(s) or sent by ordinary post to any such addresses and in the last mentioned cases, the service shall be deemed to be made at the time when the same would in the ordinary course of post be delivered. The decision of the charges as to what at any time is the rate or rates of interest chargeable shall be final and conclusive and shall not be questioned on any account in whatsoever.

[16] Vide exh I, the defendant has notified the plaintiff by letter dated 16 May 2001 of the closure of his current account number 184-314757611 and 184-3114797329 and to transfer the balances to his current account number 184-3114709405 and to forward any correspondences to his postal address at Level 9, Wisma Ting Pek Khing, No 1, Jalan 15 Padungan, 93100 Kuching. PO Box 3007, 93758 Kuching ('the notified address').

[17] It is to be noted that the two notices of demand, exhs E and F were all addressed to the defendant at the notified address and they are notices of demand made in respect of the said overdraft facility of overdraft account No 3-1147094-05 which is the same current account number referred to by defendant in his notification to the plaintiff of exh G.

[18] Be sending exh H (the notice of variation of interest), I hold the view that the plaintiff has complied with the requirements of cl 3 of the exh A since:

(a) exh H was a letter notifying of the change in interest rate;

(b) sent by hand to the defendant at 'his last address registered' with the plaintiff, ie the notified address; and

(c) such service of the notice shall be deemed to have been sufficiently served on the defendant.

[19] Similarly, exh H has fulfilled the requirements of cl 3 of exh B as:

(a) (a) exh H is a letter, ie a notice in writing;

(b) exh H was sent by hand to the usual address or last known place of business of the chargor (ie the notified address of the defendant); and

(c) such notice in writing shall be deemed to have been sufficiently served on the chargor (defendant) if served in the manner referred to in para (b).

[20] The defendant had acknowledged receipt of exh H as is evident by exh G. It is true (as pointed out by Mr Jussem) that as against the name of the defendant, there is an acknowledgment made bearing the chop/seal of 'MK Corporation' but to my mind, it is immaterial because exh H was addressed specifically to the defendant at the notified address:

> Tan Sri Dato' Paduka (Dr) Ting Pek Khiing
>
> Level 9 Wisma Ting Pek Khiing
>
> No 1 Jalan Padungan, 93100 Kuching

and as per exh G it was also addressed to the defendant, ie 'Tan Sri Dato Paduka (Dr) Ting Pek Khiing'. It is pertinent to note that the defendant did not in his affidavit deny the existence of 'MK Corporation' or that he had nothing to do with the said company save for the averment that 'at all material times, [he] had not personally received such notice as alleged. Neither did [he] personally sign what purports to be the acknowledgement log book/service diary incorporating notice of increased interest rate. ... Further the acknowledgement was received by a corporate body as evinced by the chop/seal clearly exhibited in 'exh G' and not me personally'

[21] In addition, I am inclined to agree as pointed out by Ms Lau Mei Ling that it would seem strange and illogical for the defendant to now contend that he did not receive exh H bearing in mind that he did not deny receiving the two notices of demand, exhs E and F, as the former bore the same address as the latter.

[22] Chong Chin Shoong pertains to an appeal from the decision of the SAR ordering summary judgment against the defendant on a claim under a contract of guarantee. The issue on appeal was whether there was proper service of the letter of demand in accordance with cl 8 of the guarantee which provided 'that any notice of demand or request required or permitted to be made or given under the guarantee shall be in writing and shall be validly given if served personally on the defendant or sent by registered post to the defendant's address and in the event of posting shall be deemed to have been received by the defendant within 48 hours after the time of posting'. Basically, his Lordship Abdul Aziz Mohamad J(as he then was) held that the parties were contractually bound by the mode of service provided in cl 8 and there was proper service of the letter of demand and 'to rebut the presumption of receipt as provided in cl 8, the defendant must show circumstances that would have rendered it impossible for him to have received the letter of demand, for instance, at the time when the postal agent attempted to deliver the letter he was away on business or holiday and no one was in occupation at the addresses. A bare denial of having received the letter of demand would not do'.

[23] In *Travers Development Sdn Bhd*, the plaintiff filed an application pursuant to s 256 of the National Land Code 1965 for sale by public auction of six properties belonging to the defendant which were charged to the plaintiff as security for a loan advanced to the defendant. The main issue was whether the defendant had shown cause to the contrary to resist the plaintiffs application and one of the grounds raised by the defendant was that it did not receive the notice of demand recalling the loan as the notice was not sent to its new registered address. His Lordship Kamalanathan Ratnam J (as he then was) held:

The parties had agreed in the contract agreement on the address for service and clearly the onus was upon the defendant to notify the plaintiff of any change of address.

However, no evidence was adduced that the defendant did notify the plaintiff of the change of address. Therefore, there had been proper service of both the notice and the statutory notice of demand and the defendant was solely to blame if it now contended that it had not received the notice and the statutory notice

[24] My findings above would in fact be consistent with the views expressed by the learned judges in the cases of *Chong Chin Shoong* and *Travers Development Sdn Bhd* as I find that the plaintiff has effected proper service in the manner contractually envisaged between him and the defendant and the plaintiff had in fact effected service on the defendant using the notified address given by the defendant and since then there has been no further notification of any change of address by the defendant to the plaintiff.

[25] Therefore, it is my finding that there is no merit in the defendant's contention that there is a triable issue in that he did not receive notice of the increased rate of 3.5% pa above the BLR at 6.40% in respect of the first letter of offer as in fact that there was proper service on the defendant of exh H (assuming it is necessary) made pursuant to cll 3 of the first letter of offer (exh A) and of the said charge (exh B) respectively.

(II) Different Account Numbers

[26] Under the purported triable issue (ii), the defendant contended that the plaintiff had demanded from different accounts basically due to the following grounds:

(a) the second letter of offer dated 9 March 2001 (exh C) is not related to the said overdraft facility due to the different account numbers, ie in exh C it is 11-043-0001-5 whereas in the two letters of demand (exhs E and F) it is 3-1147094-05;

(b) the plaintiff had no right to convert the old account number to a new account number without first informing the defendant and there was no notification sent to the defendant informing about the merger and the conversion of the account; and

(c) the defendant through exh I stated that there are three different accounts prior to the closure of the rest of the accounts and therefore there are confusing account numbers.

[27] In my view, the grounds in para (a) and (b) above can be dealt with together. Firstly, I find that the defendant's contention that the second letter of offer (exh C) is not linked to first letter of offer (exh A) is unsustainable because it is categorically stated in the second letter of offer (exh C) that 'We are pleased to inform you the Bank has agreed to continue making available to you the credit facility'. Next, the plaintiff has refuted defendant's query of plaintiff's conversion of the account number from 1104300015 to the new account number 3114709405 explaining that there was a merger of Hock Hua Bank Bhd and Public Bank Bhd sometime in April 2001. To my mind, it could be reasonably inferred that the defendant has knowledge of this

fact because vide exh I, defendant's letter dated 16 May 2001 informing plaintiff of the change in his postal address and closure of current account, he had addressed the said letter to:

> The Manager Public Bank Bhd
>
> Jalan Penrissen
>
> 143A-145AKota Sentosa
>
> Batu 7, Jalan Penrissen 93250 Kuching

[28] Further, I am in total agreement with Ms Lau Mei Ling when she submitted that the defendant in fact used the new account number 3114709405 when he wrote to the plaintiff exh I to the following effect:

> ... please close my current account No 184-3114757611 and 184-3114797329 with your Bank and transfer the balance to my current account No 184-3114709405.

[29] From the above, it is obvious that there is no merits in the defendant's contention of there being a triable issue with regard to there being different account numbers.

[30] This leads me to discount the third ground (para (c) above) as also being without any substance at all. Certainly, there cannot be any confusion in the mind of the defendant as to the account numbers even if there are three account numbers (as averred by defendant) instead of one account number under his personal name (as averred by the plaintiff) because as alluded to earlier the defendant could himself specifically cite the new account number after requesting for two old account numbers to be closed and simultaneously requesting the plaintiff to transfer the balance in the former account numbers to the new account number.

(III) Variation of Signatures

[31] As far as the contention under the purported triable issue (iii) of variation of signatures is concerned, with due respect to Mr John Jussem, I am of the opinion that his submission, 'The plaintiffs demand is questionable even to an untrained mind. Moreover evidence in 'exhs E and F' clearly showed that the letters of demand were received by 'MK Corporation' and the signatures of the person receiving them differ markedly from the defendant's signature. The same goes with 'exh G'. The variation in signatures is sufficient to show triable issues' is inaccurate. The defendant in his affidavit did not dispute receiving the two letters of demand, exhs E and F and neither is there any exhibit produced by the defendant or the plaintiff regarding who received the exhs E and F because in the first place, it is a non-issue. Therefore it is wrong for Mr John Jussem to state 'Moreover evidence in 'exhs E and F' clearly showed that the letters of demand were received by 'MK Corporation' and the signatures of the person receiving them differs markedly from the defendant's signature'.

[32] In my view, the learned counsel's submission is only true to the extent that exh G is the acknowledgement receipt of the notice of variation of interest, ie exh H. It is without doubt that even to the naked eye, the signature in exh G and the signature of the defendant in exhs A, B and C is different. However, this does not detract from

the fact that since exh I was written by the defendant himself (which is not denied) requesting all correspondences to be forwarded to him at the notified address and to which exh H dated 11 October 2002 was addressed to and thereafter served by hand on 12 October 2002, the court can only conclude there has been proper service for the reasons which I have spelled out when dealing with the purported triable issue (i) hereinbefore. Therefore in my opinion, the contention of variance of signature in exh G and exhs A, B and C (and not exhs E and F as submitted by Mr John Jussem) is of no consequence at all

(IV) No Proper Statement of Account

[33] Mr John Jussem submitted the plaintiff did not provide any proper statement of account to show as to when and how the amount allegedly owed was arrived at.

[34] I agree with Ms Lau Mei Ling that the defendant did not in his statement of defence nor in para 16 of his affidavit in opposition affirmed on 25 August 2003 plead the issue that there was no proper statement of account save for the averment 'that the purported statement of accounts is inherently flawed and totally unreliable bearing in mind paras 9, 10 and 14 of this affidavit'.

[35] In any event, in para 16 of the affidavit of Law Sie Ning (branch manager of plaintiff bank) affirmed on 15 July 2003, the deponent deposed the amount due and owing by the defendant which are particularised as per the statement of account between the plaintiff and the defendant as at 8 January 2003 as follows:

	OVERDRAFT FACILITY OF RM13,500,000.00	
(a)	The amount of the advance	: RM13,500,000.00
(b)	The amount of the repayments	: NIL
(c)	Amount of interests as at 8 January 2003	: RM 7,741,901.34
(d)	Amount outstanding due and interest accrued as at 8 January 2003	: RM26,229,013.35
(e)	The amount outstanding of a day's interest at 3.50%pa + current BLR of 6.40%pa	: RM 7,098.77

[36] Further, I also note that from exh I (exhibited by the plaintiff) the letter dated 16 May 2001, from the defendant himself to the plaintiff, he had made reference 'to my bank statement (Current Account No 184-3114709405) with your bank addressed to my resident address, I wish your bank could sent the said bank statement... to my postal address...'. Such documentary evidence would conclusively rebut any notion that there was no proper statement of account from the plaintiff since the defendant himself has acknowledged that such a statement of account did exist and he has received it.

[37] The case of *Sogelease Advance (M) Sdn Bhd v Sri Datai Engineering Sdn Bhd & Ors* [2002] 6 MLJ 59 cited by the defendant to support his contention can be distinguished as the aforesaid case pertains to a claim for special damages, like imposition of late payment charges, storage fees and sales proceeds obtained from sale of machinery founded on a hire purchase agreement, which would necessarily require the plaintiff to prove the various claims.

[38] Further, the case of *UOL Credit Sdn Bhd v Zainuddin bin Abdul Rahman & Anor* [2000] MLJU 486 also cited by the defendant in support of his contention can likewise be distinguished. In *UOL Credit Sdn Bhd* in support of plaintiff's claim for summary judgment against the defendants for breach of a facility agreement, various documentary evidence, particularly a 'certificate of outstandings', to show the amount due and owing by first defendant was tendered by the plaintiff.

[39] The instant case can be distinguished from the case of *UOL Credit Sdn Bhd* on the facts because as alluded to above, the plaintiff has produced sufficient particulars as to the statement of account to disclose the amount due and owing by the defendant and besides, the defendant himself admitted receiving from plaintiff a statement of account as evident by exh I and this issue of no proper statement of account was never raised until when plaintiff instituted this action against the defendant for default in repayment of the said overdraft facility. Therefore, I agree with the plaintiff that the defendant's contention that there is no proper statement of account is baseless.

(V) 'Some Other Reason To Be A Trial'

[40] Apart from purported triable issues (i) to (iv) discussed above, the defendant is urging the court to find that pursuant to O 14 r 3 of the RHC, summary judgment ought not to be granted as there is 'some other reason to be a trial' of the plaintiff's claim.

[41] In support of this contention, the defendant cited the case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657 where Mohamed Dzaiddin FCJ (as he then was) (delivering judgment on behalf of the Federal Court) expanded on the meaning to be ascribed to the phrase 'some other reason to be a trial'. In so doing, his Lordship at p 666 cited the case of *Miles v Bull* [1968] 3 All ER 632 quoting an excerpt from the judgment of Megarry J (pp 637–638) as follows:

> Under r 3 and r 1 of the present RSC O 14 r 1 [in para materia with O 14 r 3 of the RHC], the defendant can obtain leave to defend if ... the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross examination those which aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfied the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff.
>
> I think it is. In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think it would be just if the plaintiff were able to enforce the rights that he claims without being put to strict proof that they do enable him to evict the defendant. I was told that in granting leave to defend Master

Jacob said that the case was 'too near the bone for O 14'. That, if I may say so, seems to me to summarise admirably what I have tried to express in greater detail. RSC O 14, is for the plain and straight-forward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

I also bear in mind what Bramwetl LJ, said in Harrison v Bottenheim (1878) 26 WR 362 at p 363. Even on the old wording of RSC O 14:

> ... though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within O 14, and should not be pursued without his being allowed to defend.

[42] His Lordship at p 667 further referred to the English Court of Appeal case of *Bank fur Gemeinwirtschaft v City of London Garages Ltd & Ors* [1971] 1 All ER 541 quoting a passage from the judgment of Cairns LJ (at p 548):

> ... It is not difficult to think of other circumstances where it might be reasonable to give leave to defend although no defence was shown, eg if the defendant was unable to get in touch with some material witness who might be able to provide him with material for a defence; or if the claim were of a highly complicated or technical nature which could only properly be understood if oral evidence were given; or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it was thought desirable that if he was to get judgment at all it should be in the full light of publicity.

[43] Finally, his Lordship Mohamed Dzaiddin FCJ, also cited the case of *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 3 MLJ 1, where in a summary judgment application, the issue before the Singapore High Court was whether the circumstances were such that the defendants ought, in the interest of justice, be given time and with it the opportunity to investigate further the fraud by whatever means that were available to them, including a trial, to determine for themselves whether they were liable as bankers. His Lordship then pointed out at p 668C–D that Chan Sek Keong J (as he then was) following *Miles v Bull* held that the circumstances in which and the sheer audacity with which the fraud was carried out and the absence of an explanation by the directors of the plaintiff's constituted 'some other reason' for a trial.

[44] After an analysis of the aforesaid cases, his Lordship Mohamed Dzaiddin FCJ in *United Merchant Finance Bhd* held (see Headnote at p 658):

> There are circumstances which constitute 'some other reason to be a trial'. Firstly, although the defendants barely denied that they were constructive trustees for the deposited amount for and on behalf of the plaintiffs, the onus was on the plaintiff's to prove their claim. The law on constructive trustee in the context of banker/customer relationship is quite complicated and technical in nature and a claim based on it could only be properly proved by oral evidence. Secondly, the evidence about the two fixed deposit receipts disclosed at the criminal trial of the plaintiffs' former president may have a bearing on the present case. In the interests of justice, it is desirable that the defendants be given every opportunity to examine fully the record of the criminal proceedings which inevitably may provide them some materials for their defence.

[45] Learned counsel for the defendant, Mr John Jussem submitted that there are some other reason to be a trial as 'witnesses are required to show who actually sent

the notice of increase, who had received the notice, who received the letters of demand and most importantly plaintiff witness is required to show, as to how the calculation of large sums are arrived at cross-examination and farther investigation are needed to verify the variation of signatures that existed on the letters of demand'.

[46] Ms Lau Mei Ling, learned counsel for the plaintiff, submitted that the defendant's contention is unsubstantiated as the plaintiffs claim is plain and obvious without any need for a trial, citing *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168.

[47] The principles to be followed in construing the phrase 'some other reason to be a trial' contained in O 14 r 3 of the RHC have been carefully pronounced by the Federal Court in *United Merchant Finance Bhd* . The issue which remains is the application of the principles to the facts of the present case. In my considered opinion none of the reasons proffered by the defendant would constitute 'some reason to be a trial' as the legitimacy of these reasons have been demolished in the manner which I have explained in the course of my treatment of the purported triable issues (i) to (iv) hereinbefore and of which I do not propose to repeat them here.

[48] In conclusion, for all the foregoing reasons, I find that the defendant has failed to discharge the onus of showing that there are triable issues which would warrant for this action to proceed for trial. In the circumstances, I reversed the order of the learned deputy registrar given on 19 January 2004 and allowed order in terms of the plaintiff's application dated 15 July 2003.

Application allowed.

Reported by I Izzuddin